In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 366

CARL W. SPAHR AND WILLIAM A. KAISER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–8) is reported at 409 F. 2d 1303.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1969. (Pet App. 1.) A petition for rehearing was denied on June 20, 1969. (R. Vol I, unnumbered page.) [1] The petition for a writ of certiorari was filed on July 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the two volume record certified to the Court.

QUESTIONS PRESENTED

Whether petitioners' consent to inspection and copying of records of their corporation was rendered invalid and legally ineffective because the investigating special agent of the Internal Revenue Service did not advise them that his investigation might lead to a criminal prosecution and did not inform them of their rights under the Fourth, Fifth, and Sixth Amendments.

STATEMENT

Petitioners were convicted on all four counts of an indictment which charged them with attempting to defeat and evade the income taxes of Pioneer Die-casters, Inc., by filing false corporation income tax returns on behalf of that corporation of which they were president and vice-president. (R. Vol. I, pp. 1–6, 106–107.)

On April 14, 1964, petitioner Spahr met, by prior appointment, in the corporation offices with Special Agent Byerly and Revenue Agent Horn, who identified themselves as such agents. (Pet. App. 2; R. Vol. II, 191–193.) Spahr asked Agent Horn if he should have his representative present. Horn told Spahr this was up to him, and Spahr replied "Well, he doesn't know much about taxes anyway." (Pet. App. 3; R. Vol. II, 194.) The agents asked and were granted permission to inspect and copy corporation records. (Pet. App. 2; R. Vol. II, 184, 194.) As of that date, the agents had cause to believe that fictitious transactions had been entered on these records, but they did not know whether such entries were carried over to the corporation's tax returns, or that

the returns omitted any income from sales—and they could not ascertain this without comparing the corporation records with the tax returns. (Pet. App. 2; R. Vol. II, 204.) Evidence thus obtained was introduced against petitioners by the government, after their motion to suppress was denied. (Pet. App. 2.)

The agents did not advise petitioners of the corporation's rights under the Fourth Amendment, or of their personal privilege against self-incrimination under the Fifth Amendment or their right to counsel under the Sixth Amendment. (Pet. App. 2.) There was no testimony that either petitioner made any incriminating statement or discussed any substantive matter with the investigating agents. (Pet. App. 2.)

ARGUMENT

1. Petitioners' consent to inspection and copying of corporation records was not invalid because they were not advised of their rights under the Fourth, Fifth, and Sixth Amendments. Petitioners were not in custody or deprived of freedom in any way and were therefore not subject to the type of coercive atmosphere against which this Court established safeguards in *Escobedo* v. *Illinois,* 378 U.S. 478, and *Miranda* v. *Arizona,* 384 U.S. 436. In numerous cases, this Court has declined to review holdings of various circuits that the *Miranda* warnings are not required in tax investigations under such circumstances. See, *e.g., Taglianetti* v. *United States,* 398 F. 2d 558, 566 (C.A. 1), affirmed, 394 U.S. 316; *United States* v. *Mackiewicz,* 401 F. 2d 219, 223 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso,* 378 F.

2d 612, 619, modified, 387 F. 2d 376 (C.A. 4), certiorari denied, 390 U.S. 955; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975; *United States* v. *Maius,* 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States,* 405 F. 2d 34, 40 (C.A. 8), certiorari denied, 394 U.S. 943; *Selinger* v. *Bigler,* 377 F. 2d 542 (C.A. 9), certiorari denied, 389 U.S. 904. See also *Agoranos* v. *United States,* 409 F. 2d 833, 835 (C.A. 5), pending on petition for a writ of certiorari, No. 163, October Term, 1969; *Hensley* v. *United States,* 406 F. 2d 481, 484–485 (C.A. 10). Contra: *United States* v. *Dickerson* (C.A. 7), decided July 28, 1969 (69–2 U.S.T.C. Par. 9556).[2]

The court of appeals declined (Pet. App. 5–6) to review petitioners' contention (Pet. 21–27) that the rationale of the *Miranda* case also requires "investigating officers to advise potential defendants of their constitutional right to refuse access to government officers who seek entry without a warrant." The court of appeals correctly noted (Pet. App. 6) that this

[2] In *Dickerson*, the court of appeals held that the full *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division." However, the opinion also stated "we have determined to apply our holding to interrogations taking place after the date of this decision." See also, *United States* v. *Habig* (C.A. 7), decided July 28, 1969 (69–2 U.S.T.C. Par. 9557) (remanded to ascertain whether suppressed evidence was discovered before or after referral to Intelligence Division); Cf. *United States* v. *Lackey* (C.A. 7), decided July 16, 1969 (69–2 U.S.T.C. Par. 9532) (suppression order affirmed in view of "custodial nature" of interview by Special Agent with taxpayer). Petitions for rehearing have been filed in each of these three cases.

contention was not litigated in the district court.[3] The two cases cited by petitioners to support this contention are clearly distinguishable, since they involve restraints on freedom which vitiated the defendant's consent to a search. *United States* v. *Nikrasch,* 367 F. 2d 740, 744 (C.A. 7) (search of his auto held illegal where defendant's consent was given after he had been in custody for eight hours); *United States* v. *Blalock,* 255 F. Supp. 268, 269 (E.D. Pa.) (search of hotel room held illegal where defendant had been "frisked" in hotel lobby and escorted to his room by FBI agents). Moreover, in *Byrd* v. *Lane,* 398 F. 2d 750, 755 (C.A. 7), certiorari denied, 393 U.S. 1020, the court of appeals stated that its language in *Nikrasch* regarding the necessity of specific advice on Fourth Amendment rights was "of dubious propriety" though not inappropriate to the facts of the *Nikrasch* case. In *Gorman* v. *United States,* 380 F. 2d 158, 164, the First Circuit rejected the *Blalock* case and the language in *Nikrasch* as an inappropriate transfer of the *Miranda* rule to a setting where the problem and policies involved are quite different, *i.e.,* where the dangers of unreliable evidence are not involved and the law does not absolutely forbid forcible seizure of evidentiary articles. This seems particularly true here, where the petitioners could have been com-

[3] The petitioners' written motion to suppress (R. Vol. I, 13–14) refers only to the petitioners' right to an admonition of their right to counsel and their privilege not to incriminate themselves. Petitioners' memorandum in support of this motion (R. Vol. I, 15–48) and their oral argument to the district court (R. Vol. II, 7, 20–21) assert only the corporation's right to assistance of counsel under the Sixth Amendment.

pelled to produce the corporate records despite their incriminating nature. *Hensley* v. *United States,* 406 F. 2d 481, 484–485 (C.A. 10).

2. There is no merit to petitioners' contention (Pet. 28–31) that the agents practiced deceit because they did not advise Spahr that the investigation could result in a recommendation of criminal prosecution. The court of appeals found (Pet. App. 6–7) that the agents properly identified themselves, and that no deception was practiced (Pet. App. 6). See also *Kohatsu* v. *United States,* 351 F. 2d 898, 902 (C.A. 9), certiorari denied, 384 U.S. 1011. As pointed out in *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918, an announcement by Treasury agents that they are making even a "routine" tax investigation carries an "inherent warning" that they "will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission." Accord: *Scanlon* v. *United States,* 223 F. 2d 382, 384–385 (C.A. 1); *United States* v. *Frank,* 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States,* 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Achilli,* 234 F. 2d 797, 805–806 (C.A. 7), affirmed, 353 U.S. 373; *Zacher* v. *United States,* 227 F. 2d 219, 225–226 (C.A. 8), certiorari denied, 350 U.S. 993; *Montgomery* v. *United States,* 203 F. 2d 887, 892–893 (C.A. 5). Moreover, even if the agents' actions could be considered deceptive, the deception would not be such as to vitiate petitioners' voluntary surrender of the corporate records. *Frazier* v. *Cupp,* 394 U.S. 731, 737, 739.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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